Supreme Court, U.S.
FILED
FEB 18 1993
OFFICE OF THE CLERK

No. 92-800

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION,
Petitioner,
v.
KATHLEEN E. LES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENT TO BRIEF OF THE PRIVATE PARTY RESPONDENTS IN OPPOSITION

STEPHEN P. BERZON
INDIRA TALWANI
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street
Suite 300
San Francisco, CA 94108
(415) 421-7151

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for Respondent AFL-CIO

ALBERT H. MEYERHOFF
(Counsel of Record)
Natural Resources Defense Council
71 Stevenson Street
Suite 1825
San Francisco, CA 94105
(415) 777-0220
Attorney for Respondents Kathleen E. Les, Frances Les Thomas and Natural Resources Defense Council

[List of counsel continued on inside cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

PATTI GOLDMAN
Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000
Attorneys for Respondent Public Citizen

RALPH SANTIAGO ABASCAL
California Rural Legal Assistance, Inc.
2111 Mission Street
Suite 401
San Francisco, CA 94110
(415) 864-3405
Attorney for Respondents Manuel Jesus Perez Morales, David R. Perez, and Manuel R. Perez

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-800

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION,
Petitioner,

v.

KATHLEEN E. LES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

SUPPLEMENT TO BRIEF OF THE PRIVATE PARTY RESPONDENTS IN OPPOSITION

The private party respondents submit this supplemental brief pursuant to Rule 15.7.

Petitioner has filed a supplemental brief setting forth a portion of a press release issued by EPA in conjunction with certain lists of pesticides, but has failed to provide the Court with the full text of that document. In particular, petitioner has ignored portions of the press release stating that the lists of pesticides are tentative and that EPA has not determined whether or not tolerances for these pesticides will need to be revoked. EPA's press release states:

> For several reasons, the pesticide uses eventually affected by the Court's ruling may be considerably smaller than the attached lists. First, EPA has not made a final determination whether these pesticides meet the "induce cancer" standard in the Delaney clause. Second, many of the pesticides uses on the attached lists involve animal feeds, and EPA has not evaluated whether those uses qualify for the limited exemption to the Delaney clause for animal feeds. Finally, the Notice EPA issued on Jan. 19 requesting comment discusses several policy issues, the resolution of which will affect precisely what pesticide uses are affected and the extent of that affect.

EPA Note to Correspondents (Feb. 2, 1993).

Moreover, the listing of the specific pesticides begins with the following paragraph:

> The following lists of pesticides and their uses *may* potentially be affected should EPA be held to a strict interpretation of the Delaney clause. The lists *do not constitute a list of pesticides which EPA has determined to "induce cancer" within the meaning of the Delaney clause*, but rather presents lists of pesticides which *may possibly fall within that standard* based on EPA's evaluation of the potential carcinogenicity of the pesticides under its cancer classification guidelines. Likewise, these lists *should not be viewed as definitive or final* because they include some pesticides that ultimately may not be affected; there also may be additional pesticides that are affected, but are not included in today's list. Because the Agency continues to receive data on carcinogenicity and processing studies through its reregistration program, the number of pesticides and uses could grow considerably. The release of these lists does not affect the regulatory status of any of the pesticides or uses listed. If EPA proposes to revoke tolerances under the Federal Food, Drug and Cosmetic Act, the Agency will use appropriate procedures in each instance, including seeking notice and comment where appropriate.

Pesticide Uses Potentially Affected By Revocation of All Section 409 and Corresponding Section 408 Tolerances (Feb. 2, 1993) (emphasis added). The full text of both documents, as well as EPA's Statement on Pesticide Regulation, is provided in the appendix to this brief.

Respectfully submitted,

STEPHEN P. BERZON
INDIRA TALWANI
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street
Suite 300
San Francisco, CA 94108
(415) 421-7151

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for Respondent AFL-CIO

PATTI GOLDMAN
Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000
Attorneys for Respondent Public Citizen

ALBERT H. MEYERHOFF
(Counsel of Record)
Natural Resources Defense Council
71 Stevenson Street
Suite 1825
San Francisco, CA 94105
(415) 777-0220
Attorney for Respondents Kathleen E. Les, Frances Les Thomas and Natural Resources Defense Council

RALPH SANTIAGO ABASCAL
California Rural Legal Assistance, Inc.
2111 Mission Street
Suite 401
San Francisco, CA 94110
(415) 864-3405
Attorney for Respondents Manuel Jesus Perez Morales, David R. Perez, and Manuel R. Perez

APPENDIX

APPENDIX

United States Environmental Protection Agency

Communications, Education, And Public Affairs (A-107)

EPA ENVIRONMENTAL NEWS

STATEMENT ON PESTICIDE REGULATION

2/2/93

EPA Administrator Carol M. Browner today is releasing a list of some 35 chemicals for comment on possible cancellation. The action comes in response to a court decision regarding the Delaney Clause. Contrary to the impression left by published reports, Administrator Browner has at no time said that she wants to relax the Delaney Clause. It is the Administration's position that food safety laws need to be improved in order to give the public more protection, not less. As she moves forward with the list of chemicals for comment on possible cancellation, she does plan to confer carefully with Congressional leadership and other interested parties including environmental and agricultural groups on what course might be best for assuring safer pesticide laws. Minimal risk standards that would make Delaney consistent with other pesticide and environmental laws have been recommended by the National Academy of Science, however Administrator Browner reaffirmed her position that all options for improving food safety remain under review. She stresses EPA's commitment to the safety of the food supply in this country, and looks forward to developing a cooperative dialogue to resolve this important issue.

United States
Environmental Protection
Agency

Communications, Education,
And Public Affairs
(A-107)

EPA NOTE TO CORRESPONDENTS

TUESDAY, FEBRUARY 2, 1993

The U.S. Environmental Protection Agency has compiled the attached lists of pesticides and their uses to evaluate which pesticide uses may possibly be affected by the recent Ninth Circuit Court of Appeals decision (*Les vs Reilly*) concerning the Delaney clause. These lists are being released in conjunction with a notice issued on Jan. 19 soliciting public comment on a variety of issues concerning the Delaney clause and the court decision, namely whether EPA should modify its policy for regulating pesticides in processed food (Jan. 19 press release attached). Whether or not many of these uses are affected depends on the resolution of several complex scientific and policy issues described in that notice. Nonetheless, these lists will provide those people making comments with a better understanding of the potential impact of the Court's decision.

"EPA does not believe that the pesticides in the following lists pose an unreasonable risk to public health, based on available data," said EPA Administrator Carol Browner. "Thus, the current debate is not about health risks, but about the legal interpretation of the statute. However, the Agency does believe that the impact of the Ninth Circuit Court's decision upon pesticide users and food processors could be substantial. We will be working closely with members of Congress, appropriate federal agencies and other interested parties to assure that appropriate action is taken to address the implementation of the Court decision."

The Delaney clause in the Federal Food, Drug, and Cosmetic Act (FFDCA) provides that no additive (including pesticides) may be approved in processed food if it has been found to induce cancer in man or animals. EPA regulates pesticide residues in food under FFDCA and has interpreted the Delaney clause as subject to an exception for carcinogenic pesticides that pose only a negligible risk. This interpretation was adopted in 1988 upon the recommendation of the National Academy of Sciences.

In July 1992, the Ninth Circuit overturned EPA's interpretation of the Delaney clause, holding that the Delaney clause bars tolerances (maximum allowable levels of residues in food) for carcinogenic pesticides in processed food without regard to the degree of risk. The decision is not yet final, however, because a pesticide industry group has asked the Supreme Court to review the case and a decision as to whether it will hear the case is expected in March.

For several reasons, the pesticide uses eventually affected by the Court's ruling may be considerably smaller than the attached lists. First, EPA has not made a final determination whether these pesticides meet the "induce cancer" standard in the Delaney clause. Second, many of the pesticide uses on the attached lists involve animal feeds, and EPA has not evaluated whether those uses qualify for the limited exemption to the Delaney clause for animal feeds. Finally, the Notice EPA issued on Jan. 19 requesting comment discusses several policy issues, the resolution of which will affect precisely what pesticide uses are affected and the extent of that affect.

Conversely, these lists should not be viewed as definitive or final because there may be additional pesticides that are affected, but are not included in these lists. Because the Agency continues to receive data on carcinogenicity and processing studies through its reregistration and tolerance reassessment programs, the number of pes-

ticides and uses could grow considerably. The release of these lists does not affect the regulatory status of any of the pesticides or uses listed. If EPA proposes to revoke tolerances under the FFDCA, the Agency will use appropriate procedures in each instance, including seeking public notice and comments.

A copy of the Jan. 19 Notice is available to the press by calling Al Heier at 202-260-4374. All others requesting the Notice are asked to call 703-305-5805 or write: Public Response and Program Resources Branch, Field Operations Division (H7506C), Office of Pesticide Programs, U.S. EPA, 401 M St. S.W., Washington, D.C. 20460.

John Kasper, Director
Press Services Division

FEBRUARY 2, 1993

PESTICIDE USES POTENTIALLY AFFECTED BY REVOCATION OF ALL SECTION 409 AND CORRESPONDING SECTION 409 TOLERANCES

The following lists of pesticides and their uses may potentially be affected should EPA be held to a strict interpretation of the Delaney clause. The lists do not constitute a list of pesticides which EPA has determined to "induce cancer" within the meaning of the Delaney clause, but rather presents lists of pesticides which may possibly fall within that standard based on EPA's evaluation of the potential carcinogenicity of the pesticides under its cancer classification guidelines. Likewise, these lists should not be viewed as definitive or final because they include some pesticides that ultimately may not be affected; there also may be additional pesticides that are affected, but are not included in today's list. Because the Agency continues to receive data on carcinogenicity and processing studies through its reregistration program, the number of pesticides and uses could grow considerably. The release of these lists does not affect the regulatory statutes of any of the pesticides or uses listed. If EPA proposes to revoke tolerances under the Federal Food, Drug and Cosmetic Act, the Agency will use appropriate procedures in each instance, including seeking notice and comment where appropriate.

List I

The first list contains pesticides that have established section 409 food additive tolerances. Those challenged in court are noted with and asterisk (*).

Registered Pesticide	Raw Crop (408a)	Processed Food/Feed With 409 Tolerance(s)
Acephate	Cotton	Seed Hulls (186.100) Meal (186.100)
	Soybeans	Meal (186.100) Food handling establishments (185.100)

Registered Pesticide	Raw Crop (408a)	Processed Food/Feed With 409 Tolerance(s)
*Benomyl	Apples	Pomace (Dried) (186.350)
	Citrus	Pulp (Dried) (186.350)
	*Grapes	Pomace (Dried) (186.350)
		*Raisins (185.350)
		Raisin Waste (186.350)
	Rice	Hulls (186.350)
	*Tomatoes	*Puree or Catsup (185.350)
Captan	Grapes	Raisins (185.500)
	Corn	Seed (detreated) (186.500)
Dichlorvos		*Packaged goods (Proposed for revocation) (185.1900)
*Dicofol		*Tea (Dried) (Proposed for revocation) (185.410)
Dimethipin	Cotton	Seed Hulls (186.2050)
Dimethoate	Citrus	Pulp (dried) (186.2100)
Ethylene Oxide	Whole Spices	Ground Spices (185.2850)
	Copra, Black Walnut Meats	
*Mancozeb	*Barley	*Bran (185.6300) (revocation proposed)
		Flour (185.6300)
		Milled Fractions (186.6300)
	*Grapes	*Raisins (185.6300
	*Oats	*Bran (185.6300) (revocation proposed)
		Milled fractions (186.6300)
		Flour (185.6300)
	Rye	Flour (185.6300)
		*Bran (185.6300)
		Milled Fractions (186.6300)
	*Wheat	*Bran (185.6300)
		Flour (185.6300)
		Milled Fractions (186.6300)
Methomyl		Dried hops (185.4100)
Norflurazon	Citrus Fruit	Molasses (186.4450)
		Pulp (dried) (186.4450)
		Dried hops (185.4450)

Oxyflurofen	Cotton	Seed Oil (185.4600)
	Peppermint	Oil (185.4600)
	Spearmint	Oil (185.4600)
	Soybean	Oil (185.4600)
*Phosmet	*Cotton	*Seed oil (Crude and Refined) (185.3950)
Propargite	Apples	Dried pomace (186.5000)
	Grapes	Raisins (185.5000), Dried pomace (186.5000)
	Figs	Dried (185.5000)
	Citrus	Pulp (186.5000)
	Hops	Dried hops (185.5000)
	Tea	Dried tea (185.5000)
Simazine	Sugarcane	Molasses, byproducts (185.5350)
		Syrup, byproducts (185.5350)
		Potable water (185.5350)
Thiophanate-methyl	Apples	Pomace (dried) (186.5700)
Triadimefon (Bayleton)	Apples	Pomace (186.800)
	Barley	Milled Fractions, excluding flour (185.800)
	Grapes	Pomace (186.800)
		Raisin Waste (186.800)
	Wheat	Milled Fractions, excluding flour (185.800)
*Trifluralin (Treflan)	*Peppermint	*Oil (185.5900)
	*Spearmint	*Oil (185.5900)

List II

The following list of pesticides do not have established section 409 food additive tolerances, but based upon data indicating concentration during processing, would require food additive tolerances under EPA's current policy.

Registered Pesticide	Crop(s) With Section 408 Tolerance(s)	Processed Food(s) With No Section 409 Tolerance(s)
Acephate	soybean	Hulls
Alachlor	peanuts	Meal
	sorghum	Flour, Bran, and Germ
	soybean	Hulls, Meal
	sunflower seed	Meal

Registered Pesticide	Crops(s) With Section 408 Tolerance(s)	Processed Food(s) With No Section 409 Tolerance(s)
Asulum	sugarcane	Bagasse and Molasses
Atrazine	sugarcane	Bagasse, Molasses
Benomyl	rice	Bran
Captan	apples	Dried Pomace
	grapes	Raisin Waste, Juice and Dried Pomace
	plums	Prunes
	tomatoes	Dried Pomace
Chlorothalonil	soybeans	Hulls
	potatoes	Wet Peel
Dicamba	barley	Hulls, Bran, Pearl Barley
	millet	Hulls, Meal
	oats	Hulls, Rolled Oats
	wheat	Bran, Shorts, Middlings
Dichlorvos		Food handling establishments
Dicofol	apples	Dried Pomace
	citrus	Oil
	grapes	Dried Pomace, Raisins, Raisin Waste
		Dried Hops
Dimethoate	apples	Juice
	citrus	Oil
Hexazinone	sugarcane	Bagasse and Molasses
Lindane	tomatoes	Dried Pomace
Linuren	potatoes	Dry and Wet Peel, Dehydrated Granules, Chips
Manozeb	apples	Dried Pomace
	grapes	Raisin Waste
	sugar beets	Pulp
	wheat	Middlings
Maneb	apples	Dried Pomace
	sugar beets	Pulp
	grapes	Raisin Waste
Methidathion	citrus	Oil
Metiram	apples	Dried Pomace
	sugar beets	Pulp
Metolachlor	peanuts	Meal

Methomyl	wheat	Bran
Oxyflurofen	apples	Dried Pomace
PCNB	potatoes	Wet and Dried peel
	tomatoes	Dried Pomace
Permethrin	tomatoes	Dried Pomace (restricted to fresh tomatoes)
Phosmet	citrus	Oil
Propargite	citrus	Oil
	plums	Prunes
	grapes	Raisin Waste
Simazine	sugarcane	Bagasse
Triadimefon	pineapple	Bran